

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEON SIMS,

Defendant and Appellant.

B203366

(Los Angeles County
Super. Ct. No. BA269644)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Reversed and remanded for recalculation of custody credit; affirmed in all other respects.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted Leon Sims of assault with a deadly weapon. Sims had committed this crime while on probation for a prior offense (cocaine possession for sale). The trial court sentenced Sims to the upper term of five years on the assault count and a concurrent term of four years for two violations of the terms of his probation. Sims appeals, claiming instructional and sentencing error. We remand for recalculation of Sims's presentence custody credit, but otherwise affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

After midnight on February 2, 2006, James Christopher received a call indicating someone had stolen something from his truck. When he went outside, he saw Sims holding his daughter's backpack. Christopher asked for the backpack which was pink and lettered with his daughter's name. Sims said the backpack was his. Christopher insisted Sims return the backpack. Sims said he had paid \$1 for it and told Christopher to give him \$1. Christopher again told Sims to give him the backpack. Sims ultimately returned it. Christopher then told Sims to leave the neighborhood or he would call the police.

When Christopher told Sims to leave, Sims got agitated and angry—yelling and cursing at Christopher. Christopher called “BID” (the Downtown Center Business and Patrol Division) to report a problem on the corner and held the phone up so the public safety officers could hear what was happening. Sims said he didn't need to leave and threatened to kill Christopher. As the two moved down the street, Sims stopped and swung his right arm at Christopher. Christopher swung back to defend himself. As he hit Sims's arm, he saw a single-edged razor blade, about an inch and a half long, drop from Sims's hand and fall to the ground. If Christopher had not hit Sims's arm, Sims would have made contact with Christopher's body.

After his razor blade fell to the ground, Sims pulled out a retractable razor blade—about four inches long with a plastic handle. As he swung the blade at Christopher in a slicing motion, Christopher stepped backward and used the backpack to shield his arm from the razor.

Sims ran to the parking lot across the street. Christopher followed him because he believed Sims was dangerous and wanted him arrested. Christopher remained about 10 to 15 feet away, reporting the location to BID over the phone. Sims then turned and charged at Christopher again—this time holding the razor up as if he were holding a torch. Sims made contact, but Christopher was able to shield himself with the backpack again. Christopher ran after him. As Christopher turned a corner to follow Sims, Sims lunged at him, then moved back and ran into the street as BID arrived. If Christopher had not been able to block the blows in some way, Sims would have made contact with Christopher's body each of the four times Sims tried to do so.

The BID public safety officer who took Christopher's call (Michael Smith) heard screaming, yelling and "scuffling" in the background and heard Christopher saying, "Back off. Back off." He also heard him say, "This guy is trying to stab me." When Smith arrived at 818 Wilshire, he saw Christopher and Sims facing each other. Sims had a razor blade in his hand, and Christopher held a backpack in front of himself. Smith told Sims to back off, but he remained. Smith twice repeated his instruction, and Sims finally cooperated, backing away from Christopher. Sims put the blade back in the razor and placed the razor in his pocket. Sims was aggressive with Smith and his partner, screaming and yelling at them and using profanity. He said he "didn't do anything wrong" and was leaving.

As Smith approached him, Sims took the razor from his pocket and placed it in a blue backpack he carried. Smith detained Sims until a Los Angeles Police Department Officer (Gabriel Lopez) arrived about 15 or 20 minutes later. When Sims was taken into custody, still angry and yelling, Smith saw five or six other yellow razor blades in Sims's blue backpack. There were two retractable razor blades on the ground about five or six feet away from Sims.

Sims was charged with one count of assault with a deadly weapon. At trial, the People presented evidence of the facts summarized above. The jury found Sims guilty as charged. About a month after the jury verdict, Sims's counsel declared a doubt as to his competency under Penal Code section 1368. (All further undesignated statutory references are to the Penal Code.) The trial court agreed and ordered an examination under Evidence Code section 730. After a November 6, 2006, hearing in which the court found Sims incompetent, he was placed in the custody of the State Department of Mental Health for placement at Patton State Hospital. The trial court received a report on August 10, 2007, indicating Sims's competence to stand trial, and the trial court made such a finding. On September 20, the trial court sentenced Sims to the upper term of five years in state prison. (Sims was also sentenced to a concurrent term of four years in connection with his probation violations, but he raises no issues relating to that case in this appeal.)

Sims appeals.

DISCUSSION

I. The Trial Court Did Not Err in Failing to Instruct the Jury with CALCRIM 3500.

According to Sims, the trial court had a sua sponte duty to instruct the jury with CALCRIM 3500 (unanimity). This instruction provides:

“The defendant is charged with _____ [in Count _____] [sometime during the period of _____ to _____].

“The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

According to the record, this instruction was “refused”—“see use notes.” As stated in the use notes following CALCRIM 3500, a unanimity instruction is not required: (1) where the evidence shows only one discrete crime was committed but the

jury could possibly disagree on the underlying theory; (2) where the crime involves a continuous course of conduct, (*People v. Maury* (2003) 30 Cal.4th 342, 423); or (3) where the acts are “substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place.” (Quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 93; see also *People v. Crawford* (1982) 131 Cal.App.3d 591, 599.)

Here, Christopher testified that Sims slashed at him four times, within a period of approximately 10 minutes. Sims argued one of the razor blades was not recovered, challenged Christopher’s credibility and contended the prosecution had not met its burden of proof. A unanimity instruction is not required where the jury could not reasonably conclude the defendant did some of the alleged acts but not others or where the defendant offers essentially the same defense to all the acts. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) Further, Christopher’s testimony described a continuous course of conduct. (See *People v. Maury, supra*, 30 Cal.4th at 423.) The trial court did not err in failing to give a unanimity instruction.

Moreover, even under the standard of *Chapman v. California* (1967) 386 U.S. 18, even if a unanimity instruction was required, Sims cannot establish prejudicial error. “Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]” (*People v. Thompson, supra*, 36 Cal.App.4th at p. 853.)

II. The Trial Court Did Not Err in Instructing the Jury with CALCRIM 300.

CALCRIM 300 states as follows: “Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might

be relevant.” In Sims’s view, “By instructing the jury that the defense need not produce ‘all’ relevant evidence, the jury might be left with the belief the defense is required to produce ‘some’ evidence.” Sims concedes the weight of authority is against him but urges reconsideration of the issue and seeks to preserve it for subsequent review by our Supreme Court. For the reasons stated in *People v. Anderson* (2007) 152 Cal.App.4th 919, 937-938; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189; and *People v. Felix* (2008) 160 Cal.App.4th 849, 858, we reject Sims’s claim of error in this regard.

III. The Trial Court Did Not Err in Imposing an Upper Term Sentence.

According to the record, the trial court imposed an upper term sentence based on Sims’s lengthy criminal record, his prior convictions and his prior prison term (but noted it was not relying on one of Sims’s two prior probation cases) as well as the seriousness of Sims’s conduct in this case. Sims acknowledges his sentence is proper under *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825, and further acknowledges this court is bound by our Supreme Court’s decisions in these cases, but says he challenges these decisions and the constitutionality of his sentence in anticipation of exhausting his state remedies and preserving the issues for federal review. Under *Black II* and *Sandoval*, we reject Sims’s claim of error in the trial court’s imposition of his upper term sentence. (See also *People v. Wilson* (2008) 164 Cal.App.4th 988, 991-992.)

IV. The Trial Court Must Recalculate Sims’s Presentence Custody Credit.

Sims argues and the People agree the trial court must recalculate Sims’s presentence custody credit although they disagree on the outcome. The People acknowledge the record is unclear as to Sims’s time in jail versus Patton State Hospital. As Sims notes, pursuant to section 2900.5, subdivision (a), “in custody,” includes, “but [is] not limited to, any time spent in a jail, camp, work furlough facility, halfway house,

rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution.” Accordingly, this matter should be remanded to the trial court with directions to recalculate Sims’s presentence credit pursuant to sections 2900.5, subdivision (a), and 4019, and to modify the abstract of judgment accordingly.

DISPOSITION

The matter is remanded to the trial court with directions to recalculate Sims’s presentence credit pursuant to sections 2900.5, subdivision (a), and 4019, and to modify the abstract of judgment accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.